

STATE OF MICHIGAN
COURT OF APPEALS

THERESA SAUKAS,

Plaintiff-Appellant,

v

WALKER STREET PHARMACY, INC.,

Defendant-Appellee.

UNPUBLISHED

August 4, 2005

No. 260560

Kent Circuit Court

LC No. 03-001868-NH

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

MURPHY, J. (*dissenting*).

I respectfully dissent. My position is that a pharmacist has a legal duty to act in situations where the pharmacist is asked to fill two incompatible or contraindicated prescriptions under circumstances in which there is an unacceptable, recognized, and medically significant risk of serious harm or death to the customer should the customer take both medications in the dosages prescribed. This duty arises when the dangerously incompatible or contraindicated prescriptions are filled in a single transaction or in separate transactions handled by the same pharmacy sufficiently close in time such that it could be reasonably contemplated that the customer may still be taking the earlier prescribed and filled medication. Additionally, if the pharmacist has actual knowledge that a customer is taking a particular medication, although not filled or purchased at the pharmacy at which the pharmacist is employed, the pharmacist has a legal duty to act when filling a new prescription where there is an unacceptable, recognized, and medically significant risk of serious harm or death to the customer should the customer take both medications in the amounts prescribed. Here, defendant filled the Depakote prescription a short six months before the Lamictal prescription was first filled by defendant. Considering that defendant filled both prescriptions within a short time frame and that its records would reflect this fact, defendant's pharmacist should have minimally made inquiry as to whether plaintiff was still taking the Depakote, which would constitute reasonable conduct under the circumstances, assuming that plaintiff is able to sustain her burden of proof by showing a correlation between the medications and the injury and by showing the existence of underlying facts and circumstances necessary to give rise to a duty, e.g., facts suggesting a medically significant risk of serious harm or death. Minimally, there are genuine issues of material fact regarding these various underlying factors that would, if established at trial, support a finding that defendant was under a legal duty to act. Accordingly, I would reverse.

“Ordinarily, the element of duty in a negligence action is one of law for the court to decide. However, where there are factual circumstances which give rise to a duty, the existence

or nonexistence of those facts must be decided by a jury.” *Aisner v Lafayette Towers*, 129 Mich App 642, 645; 341 NW2d 852 (1983), citing in part *Farwell v Keaton*, 396 Mich 281, 286-287; 240 NW2d 217 (1976); see also *Holland v Liedel*, 197 Mich App 60, 65; 494 NW2d 772 (1992)(where determination of duty depends on factual findings those findings must be found by the jury).

In my opinion, the case before us today presents a close call because plaintiff would have apparently finished taking the Depakote prescription, filled in June 2000, sometime in July 2000 in light of the quantity and dosage, and the Lamictal prescription was first filled in December 2000. However, in today’s age it is not uncommon for patients to obtain and continue taking medications through alternative, less expensive sources such as mail order, or even through samples handed out by their own doctor, and dosages are not necessarily completed in timely fashion where situations often arise in which a patient temporarily stops taking the medication and then resumes the medication for any number of reasons, e.g., a person forgets to pack the medication on a week-long trip. Considering that the pharmacist here had information at his fingertips showing that plaintiff had recently been taking Depakote, and viewing the documentary evidence in a light most favorable to plaintiff which lends support to her claim that dangerous or fatal interactions often occur when taking the two medications as prescribed, a duty to act arose on defendant’s part that would not have been overly burdensome, where defendant’s personnel could simply have asked plaintiff whether she was still taking Depakote. Moreover, I do not believe that applying the duty I have suggested would interfere with the physician-patient relationship, open the floodgates to litigation against pharmacies, overburden pharmacies, hamper pharmacy operations, or inconvenience customers who patronize pharmacies.

In *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203-204; 544 NW2d 727 (1996), the panel, after first noting the various circumstances in which a pharmacist has or does not have a legal duty to act pursuant to the case law developed up to the time of the decision, stated that this Court has “specifically reserved consideration of a pharmacist’s liability in situations where the pharmacist knows of a particular patient’s unique problems or where a pharmacist fills two incompatible prescriptions.” While *Baker* found that the defendant pharmacy voluntarily assumed a legal duty to utilize its computer technology with due care when it advertised a computer system that would monitor its customers’ medication profiles for adverse drug reactions, I would extend the holding to the level of duty elaborated above in this dissent regardless of whether a duty was voluntarily assumed.

A legal commentator recently observed, “[C]ourts appear to be retreating from some of the special ‘no duty’ rules that once typified medical malpractice law, such as the rule that pharmacists have no duty to warn patients about incompatible prescriptions[.]” Peters, *The Role of the Jury in Modern Malpractice Law*, 87 Iowa L R 909, 918 (2002).¹ The Washington Supreme Court has noted, “We agree pharmacists should have a duty to be alert for patent errors

¹ Professor Peters cites in support of his proposition an earlier law review article that he authored, Peters, *Breaking Down the Boundaries of Malpractice Law*, 65 Mo L R 1047, 1047 (2000), which in turn cites *Horner v Spalitto*, 1 SW3d 519 (Mo App, 1999).

in a prescription, for example: obvious lethal dosages, inadequacies in the instructions, known contraindications, or incompatible prescriptions, and to take corrective measures.” *McKee v American Home Products, Corp*, 113 Wash 2d 701, 715; 782 P2d 1045 (1989)(emphasis deleted; internal footnotes omitted). In *Hand v Krakowski*, 89 AD 2d 650, 651; 453 NYS2d 121 (1982), the court, reversing an order granting summary disposition, stated:

Here, the decedent’s pharmaceutical records identified her as an “alcoholic.” Yet, [the pharmacy] during the 10-month period preceding decedent’s death, issued to her 728 units of psychotropic drugs knowing that such opiates are contraindicated with the use of alcohol. . . . Such conduct, in our view, could be found to constitute a breach of a druggist’s duty of ordinary care in that it knowingly ignores the danger and consequences of ingestion by an alcoholic of prescription drugs commonly recognized to be contraindicated. . . . Here, [the pharmacy] knew that the decedent was alcoholic and knew, or should have known, that the prescribed drugs were contraindicated and, therefore, extremely dangerous to the well-being of its customer. Clearly, under these circumstances, the dispensing druggist may have had a duty to warn decedent of the grave danger involved and to inquire of the prescribing doctors if such drugs should not be discontinued.

Here, review of plaintiff’s pharmaceutical records under the control of defendant would have revealed the fairly recent prescription for Depakote (valproic acid) that was filled by defendant pharmacy, and there was evidence suggesting grave danger may come to plaintiff if she were also taking Lamictal along with the Depakote in the amounts prescribed. The drug information sheet with respect to Lamictal (generic name – lamotrigine) provides:

WARNING even fatal rashes have occurred while using this medicine. These rashes (e.g., Stevens-Johnson syndrome) are more common in children . . . than in adults. . . . Immediately notify your doctor if you develop any type of rash. If this medicine is the cause of the rash, the drug must be stopped. Even after stopping this medicine, it is possible for the rash to cause permanent or fatal scarring along with other problems. The possibility of a rash may be increased by using too much of this medicine when treatment begins . . . or taking valproic acid with lamotrigine. [Emphasis added.]

“In determining whether a legal duty exists, courts examine a variety of factors, including ‘foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting liability for breach.’” *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004)(citations omitted; omission in original).

Where a pharmacy fills a prescription for a medication that is shown to be often dangerously incompatible with another prescribed medicine filled at the same pharmacy and an injury results, all as alleged by plaintiff and reflected in documentary evidence submitted for purposes of summary disposition, there would clearly exist foreseeability of harm, a significant degree of certainty of injury, a close connection between dispensation of the medicine and the injury, and ethical and moral blameworthiness. In such situations, public policy would demand

that a duty be established to prevent harm in the future. Furthermore, in this technologically advanced age, there can be no dispute that pharmacies have, or can easily acquire, the ability to effectively and handily monitor and be made aware of the drugs filled by the pharmacy relative to a particular customer such that the legal duty I have set forth herein can be satisfied without overburdening the pharmacy industry. I believe that pharmacists have the necessary skills and tools to notice errors of drug incompatibility, that pharmacists are in the best position to alert prescribing doctors about possible errors, that by holding pharmacists accountable the quality of healthcare will improve, and that any burden on pharmacists is outweighed by the public benefit. Because questions of fact exist relative to the issue of duty, which arises under the factual circumstances I espoused above, reversal is warranted.

I respectfully dissent.

/s/ William B. Murphy